



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

OBJECTION TO AN  
APPURTENANT RIGHTS CLAIM

Form APRT-OBJ

For Official Use Only:

2012 SEP 21 PM 1:23

**Instructions:** Complete one (1) "Objection to an Appurtenant Rights Claim Form" (Form APRT-OBJ) for each Appurtenant rights claim to which you object.

- Any person or entity with a legal or material interest in the water may file written objections. Persons filing objections must serve copies of the written objection and all related documentation / evidence 1) on the applicant; and 2) on the Commission on Water Resource Management, P.O. Box 621, Honolulu, HI 96809.
- Appurtenant rights claimants will have an opportunity to submit a rebuttal to the written objections.
- For questions, contact the Commission's Stream Protection and Management Branch at (808) 587-0234.

**A. OBJECTOR**

NAME/COMPANY

Wailuku Water Company, LLC

Contact Person

Avery B. Chumbley

Mailing Address

P. O. Box 2790, Wailuku, Hawaii 96793

Phone

808/244-7079

Fax

808/242-7968

E-mail Address

abc@aloha.net

**Explain your legal or material interest in objecting to this Appurtenant rights claim.**

Wailuku Water Company, LLC is the owner and operator of the private distribution system through which the Applicant receives surface water. Determination of Applicant's claim of an appurtenant right to water that is distributed through Wailuku Water Company, LLC's distribution system may impact the operation of the distribution system and will affect the property rights of Wailuku Water Company, LLC.

**B. APPLICANT (As listed in the Public Notice)**

NAME/COMPANY

David Niehaus

Permit Application No.

1630 Piihole Road

Mailing Address

Makawao, HI 96768

SWUPA# 2163

Identify all Tax Map Keys (TMK) rel.

TMK: (2)3-5-002-007

**C. REASON(S) FOR OBJECTION**

**Select all that apply below. The objector has the burden of proof on all objections.**



The parcel was not used as a residence or for cultivation at the time of the Mahele.



The Appurtenant right to water has been reserved or extinguished.



There are materially false statements or representations in the claimant's application for Appurtenant rights.

**Summarize carefully your objection and how approval of this Application would adversely affect your legal interests (Use separate page if needed):**

The claim must be reviewed in light of the following:

- 1-Whether the claim properly characterized the source of the water for which the claim is asserted;
- 2-Whether the rights claimed are subject to Public Utilities Commission Regulation; and
- 3-Whether the rights have been extinguished.

See the attached sheets which expand on the objections and provide documentary support for the objection(s).

**Supporting documentation / evidence must be provided on separate sheets.**

**D. OBJECTOR SIGNATURE**



By checking this box (for electronic submissions) or signing below (for hardcopy submissions) indicates that the signatory understands and swears that the information provided is accurate and true to the best of their knowledge.

Print Name:

Avery B. Chumbley,  
Authorized Representative

Signature:

Date:

September 18, 2012

DOC ID:  
10132

Form APRT-OBJ 08/29/2012

### Whether the Claim Properly Characterized The Source of Water

The claim contains an ambiguity or possibly a mischaracterization on the water source for the appurtenant right.

A claimant to an appurtenant right must establish that the surface water was taken directly from the stream, or from an auwai that was connected to a stream, at the time of the original conversion of the property to fee simple title.

Claims based on surface water taken from a privately owned distribution system and not from a stream, especially a distribution system that did not exist at the time of the original fee simple conversion, does not establish an appurtenant right to surface water delivered through a privately owned distribution system.

Accordingly, factual and legal questions exist on whether the subject claim for appurtenant rights derives from a diversion that existed at the time of the original fee simple conversion from a stream or an auwai that was then connected to a stream.

In addition, factual and legal questions exist as to whether applicant is required to hold a stream diversion works permit and/or a stream channel alteration permit and whether there is a right to use a privately owned distribution system if the surface water is being diverted through that privately owned distribution system.

**Rights Claimed May be Subject to Public Utilities Commission Regulation**

The claim asserts a right to use surface water that reaches the claimant's property through a distribution system owned by Wailuku Water Company, LLC

The ability of Wailuku Water Company, LLC to deliver water through that distribution system is the subject of a proceeding pending before the State of Hawaii Public Utilities Commission ("PUC").

Any determination by the Commission on Water Resource Management on claims in which the surface water is delivered through use of the distribution system owned by Wailuku Water Company, LLC must include a condition that the delivery of the surface water is subject to applicable terms, conditions, rules, regulations, decisions, orders, tariffs, and actions of the PUC (collectively "PUC Regulation")

Accordingly, factual and legal questions exist on whether the subject claim for appurtenant rights may be subject to PUC Regulation.

### **Were Appurtenant Water Rights Extinguished**

Appurtenant rights to surface water are created at the time the original conversion to fee simple land. While an appurtenant right to surface water cannot be transferred separately and apart from land to which it attaches, the right can be extinguished.

The appurtenant right to surface water is extinguished if the Grantor of the property transfers the property and either reserves the right to the Grantor or transfers the property without transferring the appurtenant right.

The conveyance document in the chain of title to the subject property contain language to the following effect:

EXCEPTING, RESERVING AND GRANTING, however, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property, including the right to develop and utilize the same; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon.

Accordingly, factual and legal questions exist as to whether an appurtenant right has been extinguished.



R-736 STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED  
MAR 08, 2002 10:30 AM  
Doc No(s) 2002-040877



/s/ CARL T. WATANABE  
ACTING  
REGISTRAR OF CONVEYANCES  
CONVEYANCE TAX: \$210.00

LAND COURT SYSTEM	REGULAR SYSTEM
Return by Mail (X) Pickup ( ) To: Avery B. Chumbley Wailuku Agribusiness Co., Inc. 255 East Waiko Road Wailuku, Hawaii 96793	TG :200204168 A TGE:A2-101-0345 MABEL LEE-ESCROW OFFICER

Tax Key: (2) 3-5-02:07 Total No. of Pages: 8

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., successor in interest to Wailuku Sugar Co., a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Maui, Hawaii 96793, hereinafter called the "Grantor," for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration to Grantor paid by DAVID PAUL NIEHAUS, husband of Deborah Laurine Mathias, whose address is 1630 Piiholo Road, Makawao, Maui, Hawaii 96768, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby give,

grant, convey, release and forever quitclaim unto the said Grantee, as a tenant in severalty, all of Grantor's right, title and interest in and to the real property described in Exhibit "A" attached hereto and by this reference incorporated herein (the "Property"); subject, however, to all encumbrances noted on said Exhibit "A".

EXCEPTING AND RESERVING, HOWEVER, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property, including any and all existing water delivery system improvements such as, but not limited to, the Everett Ditch; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon; it being understood and agreed, however, that the Grantee shall not have access to the Everett Ditch and that the Grantee is prohibited from taking and/or storing any water from the Everett Ditch without the prior written consent of the Grantor.

EXCEPTING AND RESERVING, FURTHER, unto Grantor, its successors and assigns forever, as appurtenant to the lands which are located adjacent or in the vicinity of the Property and which are now owned or used or hereafter acquired and used by Grantor, its successors and assigns, in agricultural operation, the unrestricted right to engage in any type of

farming operation, including, but not limited to, open burning, percolating, evaporating, fertilizing, milling, generating power, water diversion, plowing, grading, storing, hauling, spraying pesticides, irrigating, crop dusting, and all other activities incidental to the planting, farming, harvesting and processing of agricultural products and by-products, which operations may from time to time cause noxious emissions such as noise, smoke, dust, light, heat, vapor, odor, chemicals, vibration, and other nuisances to be discharged or emitted over and upon the Property. Grantor, its successors and assigns, shall not be responsible or liable to Grantee, his heirs, personal representatives and assigns, for the consequences from the creation and discharge of such noxious emissions within the Federal and State environmental and agricultural laws and regulations, and Grantee, his heirs, personal representatives and assigns, shall indemnify and hold Grantor, its successors and assigns, harmless from any liability or expense resulting from such claims arising from such nuisance whether made by Grantee or guests or other persons using the Property.

EXCEPTING AND RESERVING, FURTHER, unto Grantor, its successors and assigns, watercourse easement(s) of such character and sufficient size as Grantor, its successors and assigns, may establish for the flowage and direction of water or water-suspended material or the flotation of other objects upon,

through, along and over the Property in such location as shall be mutually agreed in writing from time to time, including the right to construct, maintain, operate, repair or remove improvements in connection with said easement(s) and together with such rights of way for ingress and egress as shall be reasonably necessary in connection herewith.

Grantor shall have, and is hereby reserved to Grantor, its successors and assigns, perpetual easements over, through and across the Property, and appurtenant to the Grantor's land or appropriate portions thereof, as necessary to accommodate drainage from or across the Grantor's land in its currently existing and/or natural pattern and flow to its place of entry upon and from the Property. Grantee, for himself and his heirs, personal representatives and assigns, hereby assumes all liability for damage to persons or property caused by or resulting from the flow of drainage from, over, through or across the Property, or any interference herewith, and hereby agrees, for himself and his heirs, personal representatives and assigns, that he does and shall indemnify, defend and hold harmless Grantor and Grantor-related entities from and against any liability, claim, demand, action or suit arising out of or in connection with such drainage.

TO HAVE AND TO HOLD the same, together with all buildings and other improvements, rights, easements, privileges



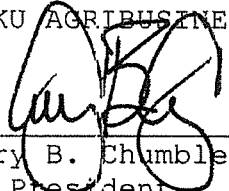
and appurtenances thereon or thereunto belonging or in anywise appertaining or held and enjoyed therewith, unto the said Grantee, forever.

The terms "Grantor" and "Grantee", as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine or feminine, or neuter, the singular or plural number, individuals or corporations, and their and each of their respective successors, heirs, personal representatives, and permitted assigns, according to the context hereof. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall for all purposes be joint and several.

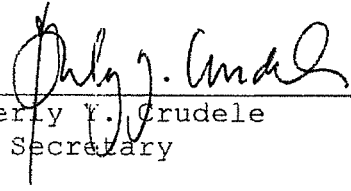
IN WITNESS WHEREOF, the Grantor and the Grantee have executed these presents on this 21<sup>st</sup> day of February, 2002.

/ WAILUKU AGRIBUSINESS CO., INC.

By

  
Avery B. Chumbley  
Its President

By

  
Beverly Y. Crudele  
Its Secretary

Successor in interest to Wailuku  
Sugar Co.

Grantor

David Paul Niehaus  
DAVID PAUL NIEHAUS

Grantee

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF MAUI                    )

On this 21<sup>st</sup> day of February, 2002, before me personally appeared AVERY B. CHUMBLEY, to me personally known, who being by me duly sworn or affirmed, did say that he is the PRESIDENT of WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, and that the instrument was signed in behalf of the corporation by authority of its Board of Directors, and the said officer acknowledged the instrument to be the free act and deed of the corporation.

Sherrill R. Anzola  
Print Name: Sherrill R. Anzola  
Notary Public, State of Hawaii.

L.S.

My commission expires: August 15, 2002

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF HAWAII                    )

On this 15<sup>th</sup> day of February, 2002, before me personally appeared BEVERLY Y. CRUDELE, to me personally known, who being by me duly sworn or affirmed, did say that she is the SECRETARY of WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, and that the instrument was signed in behalf of the corporation by authority of its Board of Directors, and the said officer acknowledged the instrument to be the free act and deed of the corporation.

Nora Rosario L.S.  
Print Name: Nora Rosario  
Notary Public, State of Hawaii.

My commission expires: 12-13-2002

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF MAUI                    )

On this 21<sup>st</sup> day of February, 2002, before me personally appeared DAVID PAUL NIEHAUS, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.

*Genianne L. Amos*  
Print Name: Genianne L. Amos  
Notary Public, State of Hawaii.

My commission expires: August 15, 2002

L.S.

EXHIBIT "A"

All of that certain parcel of land situate at Waikapu, Wailuku, Island and County of Maui, State of Hawaii, containing an area of 165 acres, more or less, and identified on the Tax Map of the Second Taxation Division as TMK (2) 3-5-02-07.

TOGETHER WITH a perpetual, nonexclusive easement for access and utility purposes, over and across Easement "A-1" situate at Waikapu, Wailuku, Island and County of Maui, State of Hawaii, being an access and utility easement, containing an area of 7,612 square feet, more or less, as shown on the Easement Map attached as Exhibit "A" and more particularly described in Exhibit "B", both attached to that certain Easement entered into by and between the parties hereto dated February 21, 2002, filed in the said Land Court as Land Court Document No. \_\_\_\_\_, and also recorded in the Bureau of Conveyances of the State of Hawaii as Document No. \_\_\_\_\_.

SUBJECT, HOWEVER, to all encumbrances of record as of the date of recording of this instrument in the Bureau of Conveyances of the State of Hawaii.

END OF EXHIBIT "A"

Tax Key: (2) 3-5-02-07